91 FLRR 1-1280

Department of the Interior, Bureau of Reclamation, Lower Colorado Region, Yuma, AZ and NFFE, Local 1487

Federal Labor Relations Authority

0-AR-1984; 41 FLRA No. 1; 41 FLRA 3

June 4, 1991

Judge / Administrative Officer

Before: McKee, Chairman, Talkin and Armendariz, Members

Related Index Numbers

01.265

01.287

16.79 Employees With Special Statutory Treatment, Miscellaneous Special Categories, Prevailing Rate Employees

42.4 Scope of Bargaining, Determination of Negotiability

42.44 Scope of Bargaining, Determination of Negotiability, Conflict With Laws

44.646 Subjects of Bargaining, Union Rights and Responsibilities, Agency Services and Facilities, Office Space

47.62 Grievances/Grievance Arbitration, Arbitrator, Authority

47.8611 Grievances/Grievance Arbitration, Grievance Arbitration Award, Review, Grounds, Violation of Law

47.862 Grievances/Grievance Arbitration, Grievance Arbitration Award, Review, Procedure

55.32 Interest Arbitration, Duty to Proceed, Court Ordered

55.35 Interest Arbitration, Duty to Proceed, Voluntary

55.86 Interest Arbitration, Awards, Review

Case Summary

THE FLRA ADDRESSES THE EXTENT TO WHICH ARBITRATORS MAY RESOLVE NEGOTIABILITY QUESTIONS, THE PROCEDURE FOR REVIEWING INTEREST ARBITRATION AWARDS, AND THE APPLICABILITY OF THE SAVINGS CLAUSE OF SECTION 704(A). (1) The FLRA ruled that an interest arbitration award that resulted from FSIP approval of a joint request under 5 USC 7119(b)(2) was reviewable as an arbitration award under 5 USC 7122(a). By contrast, an interest arbitration award that resulted from Panel action pursuant to 5 USC 7119(b)(1) was nonvoluntary and was not subject to review under Section 7122(a). (2) The agency argued that the interest arbitrator exceeded his authority by deciding a negotiability issue that was not governed by FLRA precedent. The Authority noted that, under the *Carswell* decision [31 FLRA 620, 88 FLRR 1-1081], an interest arbitrator may not decide a negotiability issue that is one of first impression, but he may apply existing FLRA precedent to a negotiability question to resolve it. The union sought a contract clause granting it office space (a trailer). The agency asserted that the proposal was nonnegotiable because it involved a matter that was barred by Section 704(a) [the savings clause] of the CSRA (5 USC 5343 note), since it had not been the subject of negotiations prior to 08/19/72. The Authority noted that it had previously declared proposals regarding union office space to be negotiable. However, it had never addressed an argument based on Section 704(a) with regard to the negotiability of union office space proposals. This was not fatal to the arbitrator's action. To bar an arbitrator from applying existing FLRA precedent whenever the agency raised a novel negotiability argument would impede the resolution of impasses. Therefore, the Authority ruled that an arbitrator could apply existing negotiability law, despite the raising of a novel argument. On review, the Authority would address the extent to which the new arguments had to be resolved by the Authority in the first instance. (3) The agency argued that the union, which represented prevailing rate employees subject to Section 9(b) of P.L. 92-392 and Section 704(a) of the CSRA [codified at 5 USC 5343 note], was not entitled to

bargain for union office space because that matter was not a subject of bargaining that was grandfathered pursuant to those statutory provisions. The agency conceded that union office space was a negotiable subject of bargaining under FLRA precedent governing employees not covered by the statutory grandfather clauses. The Authority held that the statutory grandfather clauses were intended to expand the areas of bargaining for prevailing rate employees by preserving bargaining over matters that had been negotiated previously, but which would be barred by the CSRA. Matters that were negotiable under the CSRA were negotiable for prevailing rate employees, regardless of whether they had been negotiated in the past. The agency's argument was rejected.

Full Text

DECISION

I. Statement of the Case

This matter is before the Authority on exceptions to the interest arbitration award of Arbitrator L. Lawrence Schultz filed by the Agency under section 7122(a) of the Federal Service Labor-Management Relations Statute and part 2425 of the Authority's Rules and Regulations. The Union filed an opposition to the Agency's exceptions.

The Arbitrator directed the parties to include in their collective bargaining agreement a provision concerning Union office space. The Agency claims that the award is deficient because the Arbitrator exceeded his authority and because the disputed provision is nonnegotiable.

For the following reasons, we conclude that the Agency has failed to establish that the award is deficient. Accordingly, we will deny the Agency's exceptions.

II. Background and Arbitrator's Award

On October 16, 1989, the Federal Service Impasses Panel (FSIP or Panel) approved the parties' joint request for approval of a binding arbitration procedure to resolve an impasse that had arisen in negotiations over the parties' term agreement. Following mediation efforts, two unresolved issues were submitted to the Arbitrator for decision. As relevant here,*1 the parties agreed that the issue before the Arbitrator was: "Is management obligated to provide the Union office space?" Award at 3.

The Arbitrator noted and rejected the Agency's contention that "providing space for the Union was not intended to be a subject for bargaining" under section 704(a) of the Civil Service Reform Act of 1978 (CSRA) because "it was not negotiated prior to August 19, 1972." Id. at 4. The Arbitrator stated that "[t]here is no case cited that would substantiate such a claim by the Agency." Id. The Arbitrator also stated that two cases supported the Union's contention that proposals requiring an agency to provide a union with office space are negotiable.*2 The Arbitrator concluded that the issue before him concerned a mandatory subject of bargaining and, on the merits, issued the following award:

1. The Agency shall provide a trailer for the Union.

2. The trailer shall be emplaced on a site reasonably accessible to its members.

3. The total cost of having the structure conform to applicable code shall be borne by the Union.

4. If available, the Agency shall provide office equipment to the extent of a desk, two chairs[,] two filing cabinets and a telephone.

5. Electrical power, air conditioning and telephone charges shall be borne by the Union.

Id. at 8.

III. Positions of the Parties

A. The Agency

The Agency asserts that the award is deficient because: (1) the Arbitrator exceeded his authority by making a negotiability determination, and (2) the Arbitrator erred by determining that the matter of Union office space is negotiable in this case.

With respect to the first exception, the Agency argues that, consistent with the Authority's decision in Commander, Carswell Air Force Base, Texas and

American Federation of Government Employees. Local 1364, 31 FLRA 620 (1988) (Carswell), interest arbitrators are not authorized to resolve negotiability disputes. According to the Agency, the Arbitrator resolved improperly the parties' dispute over the negotiability of Union office space.

With regard to the second exception, the Agency asserts that even if the Arbitrator's decision was consistent with Authority case law at the time of the arbitration hearing, the Authority's decision in Department of the Interior, Bureau of Reclamation, Washington, D.C., 36 FLRA 3 (1990), petition for review filed sub nom. American Federation of Government Employees, Local 1978 v. FLRA, No. 90-70388 (9th Cir. July 30, 1990), issued subsequent to the hearing, demonstrates that the award conflicts with section 704(a) of the CSRA. The Agency argues, in this regard, that "[s]ince the matter of union office space was never negotiated prior to August 19, 1972, it is not now negotiable." Exceptions at 9-10. The Agency relies for support on the decisions of the U.S. Courts of Appeals for the Ninth, Tenth, and District of Columbia Circuits in United States Department of the Interior, Bureau of Reclamation, Rio Grande Project v. FLRA, 908 F.2d 570 (10th Cir. 1990) (Rio Grande), United States Information Agency v. FLRA, 895 F.2d 1449 (D.C. Cir. 1990) (USIA), and United States Department of the Interior, Bureau of Indian Affairs v. FLRA, 887 F.2d 172 (9th Cir. 1989) (BIA).

B. The Union

The Union argues that the Arbitrator did not exceed his authority in resolving a negotiability dispute. Rather, the Union asserts that the "Arbitrator applied existing case law in addressing a frivolous negotiability claim raised by the Agency." Opposition at 1. The Union also asserts that the Arbitrator determined correctly that the matter of Union office space is negotiable. According to the Union:

The parties agree that the matter of Union office space was not negotiated by these parties prior to August 19, 1972. However, the lack of prior negotiations on this issue is irrelevant to the negotiability of the instant proposal, because the negotiability of the provision regarding union office space is not dependent upon analysis of [s]ection 704. Section 704(a) expands the scope of bargaining beyond the normal. It does not affect the negotiability of proposals negotiable elsewhere in the Federal sector.

Id. at 3-4.

IV. Preliminary Matter

In U.S. Department of Justice and Immigration and Naturalization Service, 37 FLRA 1346 (1990) (DOJ), reconsideration denied, 38 FLRA 946 (1990), petition for review filed sub nom. U.S. Department of Justice, Immigration and Naturalization Service v. FLRA, No. 90-1613 (D.C. Cir. Dec. 27, 1990), we addressed the procedures applicable to review of interest arbitration awards. We concluded, as relevant here, that "interest arbitration directed by the Panel under section 7119(b)(1) of the Statute does not constitute binding arbitration to which exceptions can be filed under section 7122(a)." 37 FLRA at 1358 (footnote omitted). As the issue was not before us, we did not address whether exceptions may be filed to interest arbitration awards issued following Panel approval of a joint request under section 7119(b)(2) of the Statute. Id. n.6.

The interest arbitration award now before us resulted from Panel approval of a joint request under section 7119(b)(2) of the Statute.*3 Neither party disputes our jurisdiction to resolve the exceptions. However, in view of our decision in DOJ, we take this opportunity to address the matter.

Section 7119(b) of the Statute provides that if voluntary arrangements, including the services of the Federal Mediation and Conciliation Service, fail to resolve a negotiation impasse:

(1) either party may request the Federal Service Impasses Panel to consider the matter, or

(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

The use of interest arbitration to resolve negotiation impasses is authorized under either

section 7119(b)(1) or (2). See DOJ, 37 FLRA at 1357. In particular, the Panel may direct parties to use interest arbitration pursuant to a request for Panel assistance under section 7119(b)(1) or may approve a joint request made under section 7119(b)(2). Id.

Sections 7119(b)(1) and (2) is "decidedly in the disjunctive," however. Panama Canal Commission v. FLRA, 867 F.2d 905, 908 (5th Cir. 1989) (Panama Canal). In particular, although section 7119(b)(2) refers to the parties' agreement to adopt procedures for binding arbitration, interest arbitration resulting from a request for Panel assistance under section 7119(b)(1) is "nonvoluntary[.]" Department of Defense, Office of Dependents Schools v. FLRA, 879 F.2d 1220, 1223 (4th Cir. 1989) (emphasis omitted) (Office of Dependents Schools). As such, arbitration resulting from requests under section 7119(b)(1) does not constitute "binding arbitration agreed upon by the parties and subject to review under 7122." Department of Defense Dependents Schools (Alexandria, Virginia) v. FLRA, 852 F.2d 779, 784 (4th Cir. 1988) (DODDS). Compare Department of Agriculture, Food and Nutrition Service, Western Region v. FLRA, 895 F.2d 1239, 1241 (9th Cir. 1990) (Department of Agriculture), vacating in part, 879 F.2d 655 (9th Cir. 1989) (court agreed with decisions in Panama Canal and DODDS but remanded case to the Authority*4 to consider status of interest arbitration award "when the parties agree to interest arbitration pursuant to the Panel's recommendation after one party requests the Panel's assistance under 7119(b)(1)[.]"). Accordingly, the Authority will not "entertain, as exceptions to an award, challenges to contract provisions imposed as a result of interest arbitration under section 7119(b)(1) of the Statute." DOJ, 37 FLRA at 1359 (footnote omitted).

Unlike section 7119(b)(1), section 7119(b)(2) expressly refers to "binding arbitration." Consistent with this wording, interest arbitration awards resulting from joint requests under section 7119(b)(2) of the Statute have long been held to be reviewable pursuant to exceptions filed under section 7122 of the Statute. See Department of the Air Force v. FLRA, 775 F.2d 727, 735 (6th Cir. 1985) (Air Force) (court affirmed Authority's decision that, as agency failed to file exceptions to an interest arbitration award resulting from joint request under section 7119(b)(2), award became final and binding and was not subject to collateral attack in an unfair labor practice proceeding). Nothing in the court decisions cited above provides a basis to reconsider the Authority's position with regard to review of exceptions to interest arbitration awards resulting from joint requests under section 7119(b)(2). Indeed, although the narrow issue of whether interest awards resulting from requests under section 7119(b)(2) are reviewable pursuant to exceptions has not been presented to a court,*5 two courts have expressed approval of the use of exceptions in such cases. See Panama Canal, 867 F.2d at 908 ("[I]f BOTH parties agree to arbitration under section [7119](b)(2), then the resulting arbitration award is reviewable by the FLRA under section 7122 but is not subject to agency head review.") (emphasis in original); DODDS, 852 F.2d at 783-84 ("If arbitration is the route agreed upon, either party dissatisfied with the arbitration may seek review of the award by the Authority under 7122[.]").

It is clear that, pursuant to section 7119(b)(2) of the Statute, the parties in this case agreed "to adopt a procedure for binding arbitration" of their negotiation impasse. Moreover, as noted above, neither party disputes the Authority's jurisdiction to resolve the exceptions to the interest arbitration award in this case. Accordingly, as no basis for reversing Authority precedent on this point is apparent to us, we reconfirm that the appropriate mechanism for challenging arbitration awards resulting from joint requests filed with, and approved by, the Panel under section 7119(b)(2) of the Statute is through the filing of exceptions under section 7122. We will, therefore, resolve the Agency's exceptions in this case.

V. Analysis and Conclusions

A. The Arbitrator Did Not Exceed His Authority

As the Agency points out, the Authority reaffirmed in Carswell that "[i]nterest arbitrators are not authorized to make negotiability rulings in order

to resolve questions concerning the duty to bargain under the Statute." 31 FLRA at 622. The Authority also held, however, that "not every claim in an impasse resolution proceeding that a proposal is outside the duty to bargain must be addressed by the Authority instead of the Panel or an interest arbitrator." Id. at 624. The Authority stated, in pertinent part:

There is now a substantial body of Authority precedent resolving numerous duty to bargain issues. That precedent is intended to provide guidance not only to the parties to the bargaining process, but also to third parties like the Panel and interest arbitrators whose function is to resolve negotiation impasses. In our view, the purposes of the Statute are best furthered by encouraging third party consideration and application of this precedent so as to assist in the resolution of negotiation impasses which raise substantively identical duty to bargain issues to those already decided by the Authority. No useful purpose is served by requiring the Panel or interest arbitrators to refrain from applying precedent merely in order to permit the Authority to address a substantively identical proposal which varies slightly in wording from a proposal previously addressed by the Authority.

Id. at 624-25.

The Authority held that in resolving exceptions alleging that an interest arbitrator improperly resolved a negotiability dispute, the Authority would examine: (1) the similarity between the disputed proposal and proposals previously addressed by the Authority, (2) the similarity between the parties' contentions before the Arbitrator and previous arguments in other cases, (3) the extent to which the arbitrator cited and discussed applicable precedent, and (4) any other relevant considerations. If, following this examination, it was determined that the arbitrator applied existing precedent, the Authority stated that it would "resolve the exceptions on the merits by determining whether the arbitrator correctly applied the precedent." Id. at 623.

In this case, the Arbitrator acknowledged the Agency's assertion that the matter of Union office space was nonnegotiable under section 704(a) of the CSRA "since it was not negotiated prior to August 19, 1972." Award at 4. The Arbitrator rejected the Agency's argument, however, because there was "no case cited that would substantiate such a claim . . . ." Id. The Arbitrator then noted that, in contrast, the Union's position that the matter was negotiable was supported by previous decisions. See n.2.

Applying the criteria set forth in Carswell, the Arbitrator cited and discussed precedent concerning the negotiability of proposals providing unions with office space. Moreover, the Agency does not argue that the Arbitrator exceeded his authority because he imposed a provision that is substantively dissimilar to union office space proposals previously considered by the Authority. That is, the Agency's contentions regarding the matter are not based on the wording of the proposals before the Arbitrator or the wording of the provision imposed by the Arbitrator.

It is also clear, however, that no case is cited, and none is apparent to us, where the Authority addressed the argument that a proposal which otherwise would be negotiable under the Statute is nonnegotiable under section 704(a) of the CSRA unless the parties had negotiated on the subject matter of the proposal prior to August 19, 1972. Under the second criterion set forth in Carswell, therefore, we are unable to conclude that the Agency's arguments were similar to the arguments raised in other cases involving union office space. Nevertheless, we hold that the Arbitrator did not exceed his authority by resolving a negotiability dispute.

We note, in this regard, that nothing in Carswell supports a conclusion that an agency's negotiability arguments in an interest arbitration proceeding must be identical to arguments previously addressed by the Authority in order to find that an arbitrator applied existing precedent to resolve an impasse involving a negotiability claim. Instead, the similarity between arguments before the arbitrator and arguments previously raised to the Authority is but one of the factors to be considered.

Moreover, albeit in a different context, the Authority has held that an agency "acts at its peril when it refuses to negotiate about a proposal which is substantially identical to a proposal previously found negotiable, without regard to whether [the agency] raises 'new' or 'old' arguments." U.S. Department of the Army, Fort Stewart Schools, Fort Stewart, Georgia, 37 FLRA 409, 420 (1990). To hold otherwise, the Authority stated, "would undermine the collective bargaining process by encouraging agencies to continue the litigation of negotiability issues." Id.

To hold that an interest arbitrator exceeded his or her authority by resolving an impasse whenever an agency raised a "new" negotiability argument could, in our view, also undermine the collective bargaining process. Agencies could be encouraged to raise novel, even frivolous, negotiability arguments so as to impede impasse resolution. We find no basis in the Statute, or in Carswell, for imposing such mechanical restrictions on an arbitrator's authority.

Accordingly, we hold that, consistent with Carswell, the extent to which the nature of an agency's negotiability arguments will affect an arbitrator's authority to resolve an impasse will be evaluated in light of all the circumstances in a case. In a case where a disputed proposal is substantively similar to one previously considered by the Authority and the arbitrator relies on relevant precedent in resolving the impasse, the fact that the agency's arguments may differ from those previously considered will not, standing alone, compel a conclusion that the arbitrator improperly resolved a negotiability dispute. Instead, arbitrators and the Authority, on review, must make case-by-case determinations regarding the extent to which an agency's negotiability arguments must, or should, be addressed by the Authority in the first instance. Factors relevant to such determinations would encompass such matters as whether, or to what extent, an agency's "new" arguments are reasonably based on statutory or regulatory provisions or judicial or administrative decisions interpreting such provisions, and whether, or to what extent, previous Authority precedent involving similar proposals and/or similar arguments reasonably may be viewed as viable in light of any changes in applicable law or regulation.

In this case, we find that the Arbitrator did not exceed his authority by resolving a negotiability dispute. As noted previously, the Arbitrator cited and applied existing precedent to resolve an impasse over a proposal which is, by the Agency's own admission, substantively similarly to previous proposals held negotiable pursuant to long-standing precedent. Moreover, as is discussed in detail in the next section of this decision, we conclude that the Agency's "new" argument regarding the negotiability of the matter of Union office space in this case is not reasonably grounded in section 704(a) of the CSRA, the Statute, applicable court decisions, legislative history, or Authority precedent. Accordingly, based on the record as a whole, and consistent with Carswell, we will determine whether the Arbitrator found correctly that the matter of Union office space was negotiable and whether his award is deficient as contrary to law.

B. The Award is Not Contrary to Law

The Agency does not dispute that, in general, proposals granting office space to unions are negotiable. In fact, the Agency concedes that "the present state of [F]ederal sector labor relations is that in non-section 704 cases, the granting through negotiations of union office space may well be the general rule[.]" Exceptions at 9. Nevertheless, the Agency asserts that as the unit employees involved in this case are covered by, and bargain pursuant to, section 704 of the CSRA, "the uniqueness of section 704(a) renders the [U]nion's proposal on office space non[]negotiable since the matter of union office space was not negotiated prior to August 19, 1972 and does not constitute a prevailing practice in the industry today." Id. at 4.

Section 704(a) of the CSRA provides as follows:

(a) Those terms and conditions of employment and other employment benefits with respect to Government prevailing rate employees to whom

section 9(b) of Public Law 92-392 applies which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972, shall be negotiated on and after the date of the enactment of this Act in accordance with the provisions of section 9(b) of Public Law 92-392 without regard to any provision of chapter 71 of title 5, United States Code (as amended by this title), to the extent that any such provision is inconsistent with this paragraph.

Pub. L. 95-454, 704(a) (codified at 5 U.S.C. 5343 note).

Similarly, section 9(b) of Public Law 92-392, also codified at 5 U.S.C. 5343 note, provides that provisions of the Prevailing Rate Systems Act of 1972 "shall not be construed to," as relevant here:

(3) nullify, change, or otherwise affect in any way after [August 19, 1972] any agreement, arrangement, or understanding in effect on such date with respect to the various items of subject matter of the negotiations on which any such contract in effect on such date is based or prevent the inclusion of such items of subject matter in connection with the renegotiation of any such contract, or the replacement of such contract with a new contract, after such date.

The essence of the Agency's argument is that employees who are covered by section 9(b) and 704(a) may engage in collective bargaining only pursuant to those sections. Stated otherwise, the Agency argues that these employees have no rights to bargain under the Statute but may bargain only under section 704. We reject the Agency's argument as meritless.

First, there is nothing in the Statute itself to support the Agency's argument. For example, nothing in section 7103 of the Statute, setting forth definitions and application of the Statute, may be read as excluding the employees in this case or the Agency itself from coverage. Similarly, nothing in section 7117 of the Statute, addressing the duty to bargain under the Statute, may reasonably be read as excluding the employees in this case from its coverage.

Second, the Agency's argument finds no support in the plain wording of sections 704(a) or 9(b). Section 704(a) specifically applies, by its terms, only to "[t]hose terms and conditions of employment . . . which were the subject of negotiation in accordance with prevailing rates and practices prior to August 19, 1972[.]" Nothing in section 704(a) supports a conclusion that it applies to all terms and conditions of employment. The Union concedes that the matter of Union office space is not a term and condition of employment, within the meaning of section 704(a). As such, the matter is not covered by section 704(a).

More importantly, section 704(a) provides that those terms and conditions of employment within its coverage "shall be negotiated" after the effective date of the Statute "without regard to any provision of [the Statute] . . . to the extent that any such provision is inconsistent with [section 704(a)]." As plainly worded, therefore, section 704(a) requires bargaining, unrestricted by inconsistent provisions of the Statute, over certain conditions of employment. As such, the Agency's interpretation of section 704(a) renders that section superfluous. Put simply, if unit employees may not bargain pursuant to the Statute, it is, at best, redundant to state that those employees may bargain over certain conditions of employment without regard to inconsistent provisions of the Statute.

Similarly, nothing in section 9(b) supports the Agency's argument. Instead, section 9(b) provides only, as relevant here, that the 1972 amendments to the Prevailing Rate Systems Act were not intended to "nullify, change, or otherwise affect in any way" existing collective bargaining agreements or prevent the inclusion of provisions contained in then-existing agreements in agreements negotiated after the effective date of the amendments.

Third, the legislative history of section 704(a) confirms that the section was not intended to limit affected employee's bargaining rights under the Statute. For example, in addressing the section of the House bill that was to become section 704 of the CSRA, the Committee on Post Office and Civil

Service report stated that the section:

is intended to preserve the existing right of certain Federal prevailing rate employees to negotiate terms and conditions of employment. The committee intends that this subsection preserve unchanged the scope and substance of the existing collective bargaining relationship between the employees' representatives and the agencies involved. The subsection excludes these employees from the restrictions on the scope of collective bargaining under chapter 71, and grants them authority to negotiate pay and pay practices without regard to any provision of chapters 51, 53, and 55 of title 5, or other provisions relating to rates of pay or pay practices with respect to Federal employees.

H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 61-62 (1978), reprinted in Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute. Title VII of the Civil Service Reform Act of 1978 (Committee Print 96-7) at 707-08 (Legislative History). Similarly, the Conference Report on the bill which became the CSRA stated that section 704 "provides certain savings clauses for employees . . . who have traditionally negotiated contracts in accordance with prevailing rates . . . ." Legislative History at 827. As these statements confirm, section 704 does not limit employees' bargaining rights under the Statute. Instead, the section provides for bargaining on those terms and conditions of employment within its coverage without regard to restrictions on the scope of bargaining under the Statute.

Finally, the Agency's reliance on the courts' decisions in Rio Grande, USIA, and BIA is misplaced. We note, in this regard, that in all three cases, it was undisputed that the unions sought bargaining pursuant to section 704. Accordingly, it was not necessary for the courts to address, and they did not address, whether the unions could have asserted rights to bargain under the Statute.

Moreover, nothing in these decisions supports a conclusion that employees who are entitled to bargain pursuant to section 704 are not otherwise entitled to bargain pursuant to the Statute. In Rio Grande, for example, the court stated that the "legislative history makes it clear that Section 704 was intended to 'grandfather' collective bargaining agreements between prevailing rate employees and federal employers that were in effect at the time the Civil Service Reform Act was enacted." 908 F.2d at 574. Similarly, the court in BIA referred to section 9(b) as a "savings clause to prevent disruption or modification of existing bargaining relationships[]" and noted that "[t]he savings clause was subsequently modified by the Civil Service Reform Act of 1978[.]" 887 F.2d at 174. It would, of course, be unnecessary to provide "grandfather" or "savings" clauses if, in fact, affected employees were not otherwise subject to the Statute.

Finally, similar to the proposals in dispute in Rio Grande and BIA, there was no dispute before the court in USIA that the union sought to bargain pursuant to section 704. The Agency's interpretation of section 704 is, however, directly contradicted by the court's discussion of that section:

[I]n section 9(b) . . . , Congress specifically preserved the rights of parties to collective bargaining agreements in effect on August 19, 1972, to negotiate "with respect to the various items of subject matter of negotiations on which" those contracts were based. Similarly, in enacting the Civil Service Reform Act in 1978, Congress again provided for the protection of bargaining rights for prevailing rate employees.

Thus, sections 9(b) and 704 serve to "grandfather-in" bargaining rights for prevailing rate employees with respect to subjects that might otherwise be NON-NEGOTIABLE "management rights" under 5 U.S.C. 7106 or NON-NEGOTIABLE pay provisions reserved to agency regulation.

USIA, 895 F.2d at 1451 (citations omitted) (emphasis in original).

As the court in USIA makes clear, section 704 provides for bargaining on matters which otherwise

would be nonnegotiable under the Statute. That is, section 704 provides an exception to the limitations on bargaining in the Statute for certain conditions of employment. Section 704 does not, however, limit bargaining rights under the Statute.

Based on the foregoing, it is clear that matters which are negotiable under the Statute are negotiable also for employees entitled to bargain pursuant to section 704. The Agency makes no claim, in this regard, that the matter of Union office space in general, or the provision imposed by the Arbitrator in particular, is nonnegotiable under the Statute. In fact, as noted previously, the Agency concedes the contrary. We find, therefore, that the provision imposed by the Arbitrator is not inconsistent with section 704 or otherwise contrary to law.*6

The Agency has not demonstrated that the Arbitrator exceeded his authority or that the Arbitrator's award is deficient on any of the grounds set forth in section 7122 of the Statute. Accordingly, we will deny the Agency's exceptions.

VI. Decision

The Agency's exceptions are denied.

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1. The Arbitrator also resolved a second issue. As no exceptions were filed to that aspect of the award, it will not be addressed herein.

2. The Arbitrator cited American Federation of Government Employees AFL-CIO, Local 1631 and Veterans Administration Medical Center, Chillichothe, Ohio, 25 FLRA 366 (1987); and a decision issued by the Federal Labor Relations Council under Executive Order 11491, as amended, American Federation of Government Employees, Local 1626 and General Services Administration, Region 5, 5 FLRC 615 (1977).

3. Case No. 90 FSIP 3 (October 16, 1989).

4. The remand from the U.S. Court of Appeals for the Ninth Circuit is currently pending before the Authority.

5. It does not appear, in this regard, that the agency contested, in general, the Authority's jurisdiction to resolve exceptions to interest arbitration awards under section 7122 in Air Force.

6. In addition to the decisions concerning the negotiability of proposals relating to union office space cited by the Arbitrator, see n.2, see National Treasury Employees Union and U.S. Department of the Treasury, Internal Revenue Service, 38 FLRA 615, 618-21 (1990), petition for review filed sub nom. National Treasury Employees Union v. FLRA, No. 91-1048 (D.C. Cir. Jan. 25, 1991).

